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Livin' Spoonful, Inc. and Portland Industrial Workers of the World General Membership Branch.
Case 19–CA–084278

September 26, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On August 26, 2013, Administrative Law Judge Eleanor Laws issued the attached decision. Employee Adam Kohut filed exceptions, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge's rulings, findings,² and conclusions,³ and to adopt the recommended order.

¹ In its answering brief, the Respondent urges the Board to disregard employee Kohut's exceptions, asserting that they fail to comply with Sec. 102.46 of the Board's Rules and Regulations. We decline to do so. Although Kohut's exceptions do not fully comply with the Board's Rules, they are not so deficient as to warrant striking, particularly in light of Kohut's pro se status. See generally *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998) ("The Board typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules."). No party has asserted that Kohut lacks standing to file exceptions.

² Employee Kohut has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We agree with the judge's conclusion that the General Counsel failed to prove that the Respondent discharged Kohut based on animus towards his protected activity. We further find, in agreement with the judge, that even assuming the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent established that it would have terminated Kohut regardless of any protected concerted activity.

However, in adopting the judge's findings, we do not rely on her suggestion that where, as here, all of the employees engaged in "the same protected activities," and only one suffered negative consequences, the evidence does not warrant an inference of animus. See *Handicabs, Inc.*, 318 NLRB 890, 897–898 (1995) (noting that "[a]n employer's failure to discriminate against every [employee who engaged in protected activity] does not disprove a conclusion that it discriminated against one of them," and collecting relevant cases), enf'd. 95 F.3d 681 (8th Cir. 1996); accord: *Pacific Design Center*, 339 NLRB 415, 419 (2003).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 26, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Mara-Louise Anzalone, for the Acting General Counsel.
Kyle Abraham, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Portland, Oregon, on April 16–17, 2013. The Portland Industrial Workers of the World, General Membership Branch (the Charging Party, the Union, or IWW) filed the charge on July 7, 2012,¹ and the Acting General Counsel issued the complaint on December 13.

The complaint alleges that Livin' Spoonful, Inc. (the Respondent or the Company), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging employee Adam Kohut because he engaged in protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

Member Miscimarra disagrees with his colleagues' disclaimer of reliance on the judge's finding that it is inappropriate to infer animus where multiple employees engage in the same protected activity, and only some experience negative consequences. In his view, the judge's analysis regarding this issue is correct. Rejecting a "disparate treatment" argument, the judge observed that "[a]ll three employees [Kohut and two others] engaged in the protected concerted activity at issue." To be probative of animus against the protected activity, evidence of disparate treatment must show that one or more employees who *engaged in* the activity were treated more harshly than an individual who did *not* engage in the activity. See, e.g., *Pollock Electric, Inc.*, 349 NLRB 708, 710 fn. 12 (2007) (citing *Watkins Engineers & Constructors, Inc.*, 333 NLRB 818, 819 (2001)). Here, the Respondent treated Kohut, who engaged in protected activity, differently than other employees who engaged in the same protected activity. Member Miscimarra agrees with the judge that such evidence does not logically support any inference of animus against Kohut based on the protected activity. To the contrary, it tends to *disprove* an allegation that Kohut's discharge was motivated by his protected activity.

¹ All dates are in 2012, unless otherwise indicated.

by the Acting General Counsel and the Respondent, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with an office and principal place of business in Portland, Oregon. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and the Respondent's Operations

Livin' Spoonful manufactures and sells raw gluten-free artisan crackers. Husband and wife Co-Owners James Brosseau and Sue Nackoney started the Company in 2002. It is a small operation which employs two to four employees at any given time. The crackers are made in a 600-square-foot kitchen located on couples' personal property behind their residence. Brosseau oversees the Company's day-to-day operations and manages the employees. Nackoney develops cracker recipes and collaborates with Brosseau on larger picture issues, but is not involved with the day-to-day operations.

On Mondays, Wednesdays, and Fridays, employees work a production shift. This entails spreading the wet cracker batter, putting it into a dehydrator, and then putting the dried crackers into packages for shipment. On Tuesdays and Thursdays, a prep chef makes dressing and soaks sunflower seeds for the next day's recipe. Brosseau soaks the seeds on Sunday for Monday's recipe. To soak the seeds, the prep chef spreads them in 15-gallon containers, adds water, and then levels the seeds to ensure no peaks rise above the water level. If the seeds come into contact with air, they become moldy and must be thrown out. The prep chef work requires more skill because he or she has to follow recipes and work independently and unsupervised.

Brosseau's time in the kitchen varies depending on the time of year and sales volume. At the time of the hearing, he estimated he was in the kitchen working with the employees 30–40 percent of the day on Mondays, Wednesdays, and Fridays. On Tuesdays and Thursdays, Brosseau performs administrative tasks in his office, located in his residential garage about 40 feet from the kitchen. He rarely works with the prep chef in the kitchen, but he checks in to ensure everything is running smoothly and makes periodic trips related to administrative matters.

B. The Employees and the Work Environment

Brosseau met Kohut's partner at a coffee shop he frequented, and she recommended Kohut as a potential Livin' Spoonful employee. Brosseau sat down and chatted with Kohut for roughly 20 minutes, determined he would be a good fit, and

hired him.³ When Kohut started, the employees all worked production shifts on Mondays, Wednesdays, and Fridays. Kohut also worked on Thursdays as a prep chef. Renee Manly, who started with Livin' Spoonful in September 2010, worked as a prep chef on Tuesdays. Generally, Kohut made two recipes during his Thursday shift and Manly made one recipe during her Tuesday shift. Stephanie Phillips began working for Livin' Spoonful in August 2011 on a Monday/Wednesday/Friday schedule.

Brosseau bases his employees' pay rates on a combination of job performance, work history, and skill set. Kohut began work on June 2, 2011. His starting pay was \$10.50 per hour and he received a raise to \$11 per hour after 3 weeks. Because of his good performance, Kohut's pay was raised to \$12 per hour on August 17, 2011. Phillips also began at \$10.50 per hour and received a raise to \$11 per hour within a week. Manly's starting pay is not in the record, but as of March 2012, she earned \$11.50 per hour and she received a raise to \$12.50 in August.

At all relevant times, Kohut and Phillips have been members of the IWW, referred to in slang as the "Wobblies," and Kohut has been treasurer of the Portland Branch. Kohut was also involved with the Occupy Portland movement around the time he started working at Livin' Spoonful.⁴ Brosseau knew about this, and provided some buckets and crackers for Kohut to take to the protestors.

The employees learn their job tasks from Brosseau and each other. To ensure all tasks are completed, there is a closing checklist. Employees place their initials next to a task after they perform it. Livin' Spoonful has no employee handbook. The Company likewise lacks a formal discipline system. At first, Brosseau deals with mistakes assuming they are unintentional by talking to the employee or the group about how to address the matter at hand. He sometimes counsels the employee, sometimes just lets him/her know about the mistake, and other times lets the mistake go. If someone makes multiple or repetitive mistakes, Brosseau begins to question whether the employee wants to and/or can perform correctly. On August 18, in response to a mistake Kohut had made that day, Brosseau began keeping track of both mistakes and above-the-call contributions of all employees. (GC Exhs. 7–9.)⁵ He would sometimes make a notation if he spoke to the employee about the error, but was not consistent about this aspect of his record-keeping.

While working in the kitchen, employees may talk about subjects other than work. Brosseau aims to foster a sense of community and shared experience where employees learn from

³ There was no formal job application.

⁴ Occupy Portland, inspired by the Occupy Wall Street movement, began on October 6, 2011, as a protest against social and economic inequality. See occupyportland.org

⁵ Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; "R. Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

² The Acting General Counsel's unopposed motion to correct the transcript, dated May 20, 2013, is granted and received in evidence as GC Exh. 16.

each other. During the time period relevant to the complaint, politics was a common topic of conversation when everyone, including Brosseau, was working in the kitchen. The employees and Brosseau also discussed current events, news, personal matters, and other topics.

At all relevant times, the kitchen staff listened to internet talk radio on a computer Brosseau provided. They listened to Science Fridays, Against the Grain, Democracy Now, and other programs that tend toward the left politically. If the kitchen windows were open, the radio could be heard in the backyard. As a result, Brosseau and Nackoney have asked the employees to turn down the volume or close a window when one of the children was outside playing.

C. Discussions and Events During the Fall and Winter

At some point, Brosseau became aware that Kohut and Phillips were members of the IWW and that all of the employees supported labor unions. Kohut mentioned the IWW at work and Brosseau discussed it with the employees a couple of times. In the fall of 2011, Manly heard Brosseau, who was on the phone, say he had a couple of Wobblies in the room with him, or words to that effect. In October 2011, he addressed Phillips and Kohut as “Mr. and Mrs. Wobbly” while they were at the table spreading crackers. Phillips laughed and made a joke about the table being wobbly.⁶ Kohut could not remember if he said anything, but the comment made him feel uncomfortable.

About a week later, Brosseau came into the kitchen and said he had read the IWW constitution. He asked the meaning of the preamble’s first line, which states, “The working class and the employing class have nothing in common.” (GC Exh. 15.) Phillips recalled he addressed the question to her and Kohut but could not recall if they responded. Kohut thought the question was directed at him. He responded, stating that the sentence is inconsistent with the Union’s actions. Brosseau expressed his belief that employers and employees have a lot in common, such as the success and continuation of the business. Kohut believed Brosseau’s question created somewhat of an awkward situation, and he thought Brosseau seemed agitated over the notion that the working class and employing class do not share the same interests.

Brosseau granted Kohut a leave of absence in October and November 2011. Kohut returned sooner than expected and Brosseau allowed him to come back to work early.

In late 2011 or early 2012, Kohut, Manly, and Phillips were working together in the kitchen.⁷ Brosseau came into the kitchen to spread crackers. They were listening to a radio program about different forms of business organizations and having a discussion about how companies distribute profits. From there, they began discussing Marx’s philosophy on exploitation. Kohut explained that Marx was critical of capitalism because profit is derived from the difference between what a worker produces and what they are paid. Brosseau asked if Kohut thought he was exploiting him. According to Brosseau, Kohut

responded, “Yes.” When he asked Kohut why he worked for him if he thought he was exploiting him, Kohut responded that he needed a job.⁸ Kohut, Manly, and Phillips recalled Kohut explained that he did not personally think Brosseau was exploiting him, but rather it was part of Marx’s critique of capitalism.

Despite Kohut’s explanation, Brosseau believed Kohut viewed him as exploitive and this shocked him. He and Nackoney became concerned about how they could maintain a work environment about which Kohut could feel positive. As a response, Brosseau decided to keep conversations in the kitchen focused on lighter topics. He noticed that his relationship with Kohut began deteriorating. He perceived that Kohut was very talkative with the rest of the employees, but gave him the cold shoulder. Because the small kitchen staff works so closely together, he believed the Company could not function without harmony in the kitchen. This caused Brosseau concern about doing things that would “ruffle his feathers” (Tr. 76.) As a result, he sometimes would not confront Kohut if he did something incorrectly. Kohut and the other employees noticed that Brosseau’s presence in the kitchen dropped off around this same time.

D. Letter to Brosseau Requesting Changes

In or around February 2012, Kohut, Manly, and Phillips were surprised when the label for the crackers changed without their knowledge.⁹ The new labels were harder to use and they had a noxious smell. When this was brought to Brosseau’s attention, he switched back to the old labels. This incident spurred the employees to discuss their concerns about Brosseau not consulting them before implementing major work changes. This led to a discussion about wages, and they discovered that Kohut earned \$12 per hour. This surprised Manly because she earned \$11.50 per hour despite her longer tenure at Livin’ Spoonful. They decided to raise their concerns with Brosseau and started collectively drafting a letter. They all discussed what would go into the letter, and Phillips did the majority of the writing.

On Friday March 2, Manly (using her other name, “Jot Nirinjan”), Phillips, and Kohut gave Brosseau a letter discussing their collective view of how they would like to see Livin’ Spoonful progress as a company. Kohut handed Brosseau the letter and, on behalf of the three employees, asked him to read it over the weekend and get back to them. In the letter, Kohut, Manly, and Phillips requested a progressively greater role in the production side of the business, such as ordering supplies and calculating work based on orders and stocking needs. They also requested equality in pay at the rate of \$12 per hour, noting that they do the same work and each employee has individual strengths in the kitchen. In addition, they requested a transparent and defined pay scale and an annual cost-of-living pay raise consistent with the Federal Government’s rate. They further

⁶ Kohut and Phillips are friends and they play in a band together called I Wobble Wobble.

⁷ The exact date of this conversation cannot be determined from the record.

⁸ The following day, Manly mentioned that she, Phillips, and Kohut wanted to brew kombucha in a part of the kitchen that was not being used. Brosseau responded, “That’s funny because they think that I’m exploiting them.” Tr. 186–187.

⁹ This date is an estimate based on testimony about the time it took the employees to draft a letter addressing the label change.

asked for raises on a defined timeline, using every 6 months as an example, according to a scale and peer reviews. (GC Exh. 4.) The following Monday Brosseau and Nackoney came into the kitchen, thanked the staff for the letter, and said they were time pressed at the moment but would respond as soon as they could.

Shortly after the letter, Kohut, Manly, and Phillips were listening to a program discussing terrorism and the government's official explanation for the use of drones. Specifically, Kohut described it as a policy speech by U.S. Attorney General Eric Holder to law students justifying targeted killings.¹⁰ Brosseau and Nackoney's 9-year-old daughter Persephone came into the kitchen and Brosseau turned off the radio. Kohut asked him why he turned the radio off, noting that Holder "was literally getting to like the good juicy part about when he was going to explain why they thought they could kill people." (Tr. 350–351). Brosseau said he wasn't going to talk about it at the moment. Phillips was surprised by Brosseau's actions because she felt that they had been encouraged to listen to NPR, the news, Science Fridays, and other similar programs.

The three employees talked to Brosseau, who said he did not want Persephone listening to political content because he and Nackoney do not expose her to the news or other media. He told the employees they could not listen to talk radio programs anymore. The following week, Phillips asked Brosseau if they could listen to talk radio when Persephone was in school. Brosseau granted this request.

E. Brosseau's Response and Employees' Reaction

Two weeks after the March 2 letter, Manly checked in with Brosseau regarding a response. Brosseau prepared a written response on March 23, which he and Nackoney both signed. Prior to drafting the letter, he consulted with Nackoney and then separately with Marilyn Scott, a retired human resources executive.¹¹ Brosseau expressed gratitude about their willingness to take on more responsibility running the production kitchen. He could not pinpoint any help he currently needed in this regard, but said that if sales continued to grow as hoped, he would evaluate which tasks he wanted to delegate. Brosseau also stated that, in response to some of their concerns, he and Nackoney were developing an employee handbook to ensure the Company's policies were in accordance with labor and employment law. He also expressed the owners' belief that employees who contribute to the Livin' Spoonful's success are morally and ethically entitled to be rewarded, and said he and Nackoney would continue to balance the Company's and employees' respective needs. To this end, he stated they would develop a transparent and defined wage scale with a 90-day probationary period. Management would consider staff input but retain discretion as to whether a probationary employee was retained.

With regard to the employees' requests for mandatory pay

¹⁰ Kohut said he thought Holder's address was to law students at Georgetown University, but it appears likely he is referring to a March 5 address on this topic to law students at Northwestern University.

¹¹ Scott informed Brosseau that the letter was concerted activity and explained what that meant.

increases based on service and cost-of-living pay increases, Brosseau noted that Livin' Spoonful was still very small, and not financially stable enough to guarantee either of these raises. To recognize employees' contributions, Brosseau implemented semiannual performance and wage reviews with uniformly defined criteria. The performance reviews would include confidential and anonymous peer reviews, but whether to grant pay raises would remain within management's discretion. (GC Exh. 5.)

Kohut, Manly, and Phillips were not happy with the Company's response. Phillips felt shut down because they had asked for more cooperation and action from the workers, yet Brosseau had made some adjustments to the workplace without including the employees. They decided they needed to talk to Brosseau about it, and about 2 weeks later they met with him. Phillips, Kohut, and Manly had prepared an outline of things they wanted to discuss and each employee presented a topic. With regard to pay, Brosseau made it clear he was not going to make the employees' pay equal and said he was not going to talk to employees about how their coworkers were paid. The employees voiced their preference for narrative evaluations as opposed to numerical ratings on performance reviews. They also talked about the employees' desire to take on more responsibility. Manly described the meeting's tone as neutral. Brosseau described the meeting as both cordial and tense. According to Brosseau, Kohut spoke with a stiff voice, almost like he was clenching his teeth. Kohut said Brosseau's demeanor varied, noting that he became agitated when discussing employees having more of a say in the business. The meeting lasted until the end of the day, around 4:30 or 5 p.m.

The employees and Brosseau agreed they had more ground to cover, so a second meeting occurred roughly a week later. Brosseau declined to grant them veto power over prospective hires. He also declined to discuss wage rates. Kohut recalled discussing cost-of-living increases. Phillips recalled Brosseau saying his business would never be a cooperative. Manly described Brosseau as more combative and defensive than in the previous meeting. When asked to explain this, she said:

I think just like stronger reactions, definitely like less—there was less trying to find middle ground, more like this is how—you know, this is how I feel and like heading off conversations—or no—yeah, just refusing to budge from like what he had set out as this is how it is.

(Tr. 204.) Kohut thought the tone of the second meeting was more intense. He noted Brosseau seemed uncomfortable talking about pay, and was a little more combative. Kohut did most of the talking at the meetings, though Manly and Phillips also spoke.

F. Pay Increase and Performance Reviews

On April 11, Brosseau notified employees he had implemented a 2-percent annual cost-of-living wage increase effective the pay period ending April 8. He notified employees that, because the Company continued to have significant debt and no savings, he could not implement merit based increases until at least August 1. (GC Exh. 6.) Phillips and Kohut had received

raises the prior August, but Manly was overdue for an annual raise. Because of this timing, the employees were upset because the raise made the pay disparity greater. They also thought the 2-percent raise was low and perpetuated the wage discrepancies. Finally, they noticed that Brosseau appeared to round the percentage in a way that widened the disparity.

The employee reviews took place in Brosseau's office, which is in the garage of his residence. Phillips' review was first, on Monday. Manly's was on Wednesday and she thought her review lasted 45 minutes to an hour. Phillips recalled her review lasting 30–45 minutes. Phillips thought Kohut was gone for about 1 or 1½ hours, as did Kohut. The employees were rated on the following seven competencies:

- Demonstrates clear understanding of the desired outcome of job task
- Is able to perform assigned tasks accurately and in an expeditious manner
- Arrives on time for scheduled shifts
- Is receptive to receiving directions from management and implements changes and new tasks without needing to be reminded
- Is receptive to receiving constructive feedback from peers
- Treats co-workers with respect and communicates constructively without judgment, blame or name calling
- Works well with others to coordinate completion of daily production goals

Kohut's written performance appraisal was dated April 18, a Wednesday. Kohut recalled his meeting with Brosseau was on a Friday, which would have been April 20. Brosseau recalled the meeting was on April 18. Regardless, Kohut received the lowest rating of the employees, with average score of 6.8 out of 10. He had high marks (7 or above) in all but two areas. He received a score of 4 on ability to perform tasks accurately and in an expeditious manner, with the following comments from Brosseau:

Adam moves at an above-average pace in general, but accuracy and quality suffer. An example, putting trays in dehydrators too quickly causing smooshed crackers, cracker batter portions/measure cups not carefully leveled, higher than average numbers of dehydrators not flipped (or turned on), despite Adam double checking his work.

He also received a 4 on receptiveness to directions from management and implementing changes and new tasks without reminders. Brosseau's comments were:

Adam is often enthusiastic and positive about making changes to how he is going about tasks but often needs to be reminded more than once, i.e. putting wax-covering boxes in recycling, not putting screen up when working with the door open, a box full of finished crackers hanging over the edge of the table, wiping hands and tools on his apron instead of using the provided sanitizing towel.

The final summarizing comments stated:

Adam excels in team environments and facilitates group cohesion and effort toward company goals. However, Adam must show improvement on items rated less than 5 in order to be considered for merit-based wage increases in August.

Kohut gave himself a rating of 5 for arriving on time for his scheduled shift. For all other competencies he gave himself a rating of 10. In the narrative section, his stated goals were to improve the quality of his work, be more punctual in the morning, and coerce Brosseau to allow him more of a role in the operations of the production kitchen. (R. Exh. 1.) Kohut's coworkers did not give him numerical scores, but provided generally positive feedback. (R. Exhs. 2–3.)

Brosseau thought Kohut was mostly receptive to the feedback he gave during the review. Kohut felt generally positive about the review and their discussion of his work. According to Kohut, Brosseau then said the exploitation comment still concerned him and he didn't want people to think he and Nackoney exploit people. Kohut became uncomfortable and, as before, tried to explain that he liked his job, he did not view Brosseau or Nackoney negatively, and he had been engaged in a philosophical discussion about how profit is generated. Kohut thought Brosseau responded relatively well to this explanation.

Brosseau held a pre-arranged second performance review with Kohut about 3–4 weeks later to follow up on the personal development goals. He took notes before, during, and after the meeting. (R. Exh. 4.) Brosseau told Kohut that he had improved in some areas. Specifically, the dehydrators had been flipped and the crackers were no longer being shoved in too quickly. He also told him he still made recipe errors, put too much batter on the tray, wiped his hands on his apron rather than using sanitizing towels, and carried loads of seeds that were too heavy. He thought Kohut needed a higher degree of attention to detail. Kohut mentioned that he felt his workload was too high. Brosseau noted he checked in with Kohut and offered help, which was almost never accepted. They agreed that Kohut would slow down his pace and not assume responsibility for getting everything done before the end of the day. Brosseau perceived Kohut's reception to the feedback from this meeting as mixed, in that he seemed to understand some of the issues were bona fide, but had a "contemptuous smirk" when discussing other issues. (Tr. 151.)

Kohut described the second review as "weird" and not very good. (Tr. 383.) Kohut voiced his belief that he had improved in all areas. He specifically disputed that he was still wiping his hands on his apron, noting he had been making a conscious effort not to do that.

G. Events in May

Manly asked Brosseau if she could have Tuesday, May 1, off to honor workers' rights. Kohut offered to work on Sunday to do Manly's Tuesday duties. Brosseau made an exception to the schedule and permitted this request even though having the kitchen operating on Sunday was a slight intrusion on weekend time with his family.

Around this same time period, Kohut told Brosseau he was expecting a baby. As the due date grew closer, Brosseau asked him how much time off he planned to take. Kohut said just a day because that was all he could afford. In response, Brosseau and Nackoney decided to implement a policy providing for a week of paid maternity/paternity leave. Kohut's baby was born on May 12, and he was off work until May 21.

Sometime in late May, Livin' Spoonful changed its seed provider. After the transition, Brosseau and the employees had to pay close attention to the amount of water added to the seed bins because the new seeds were soaking up more water. Manly was the first person to soak the new seeds during her shift on Tuesday, May 22. Her seeds were not uncovered, but she said it was close and noticed she needed to add more water. On Thursday, May 24, Kohut's duties included filling nine bins of seeds with water. Roughly 20 minutes to an hour after Kohut's shift, Brosseau discovered the bins were not sufficiently filled with water.¹² Brosseau took a photograph depicting seeds above the water level in the corner of a bin.

The next day, Brosseau and Nackoney called Kohut into Brosseau's office. Brosseau showed him a picture of the seeds on his computer and informed him that such oversights could result in an entire batch of seeds being ruined. According to Brosseau, Kohut appeared very agitated and would not accept responsibility. Kohut said he agreed there was a problem, explained the process he had taken to soak and spread the seeds, and wanted to find a way to resolve it. Brosseau explained this was an ongoing series of issues with Kohut's work performance, which Kohut disputed. Kohut said he was not told how to handle the new seeds differently. Brosseau also informed him that additional oversights would result in the loss of his Thursday prep shift and a reduction in his work schedule to 3 days per week. (GC Exh. 13.) Nackoney thought Kohut seemed angry and tense. She was very concerned about communication problems with Kohut, and the inability to discuss performance issues with him. Immediately after, Kohut and his coworkers discussed the meeting.

The following Monday, Kohut, Manly, and Annie Minninger, a recently hired temporary production employee, were scheduled to work. When they went to get the seeds Brosseau had soaked on Sunday, they noticed they were not fully covered with water. Manly went to Brosseau's office to inform him of the problem. When Brosseau saw the seeds, he initially tried to explain they had been covered in water but were floating. He ultimately said that the new seeds were soaking up more water and instructed the employees to put 3 inches of water on top of them rather than 2, which had been the previous guideline.¹³

¹² At the hearing and in the notes Brosseau made for a meeting with Kohut, he stated he saw the seeds 20 minutes after Kohut's shift, but in his affidavit he stated it was an hour.

¹³ Kohut said Brosseau never instructed them on how much water to use. I credit Manly's recollection based on its specificity. Her open demeanor and the detail in her testimony on this topic convince me she had good recollection of what Brosseau said.

H. June 4 Exchange and Kohut's Termination

The employees became fearful that Kohut was being retaliated against, and they were concerned that there was a significant change in how discipline was being administered. They decided to prepare a letter for Brosseau. Kohut, Manly, and Phillips drafted the letter, and Anne Minninger reviewed it. In the letter, they voiced their belief that similar mistakes had been treated less harshly in the past, and criticized Brosseau's use of punishment and threats to decrease mistakes. The employees also expressed concern about their perception of bias with regard to critiquing Kohut. They noted Kohut's concern, expressed in his performance review, about feeling overburdened on Thursdays, and asked what was being done to address the issue. They closed by expressing their confidence in Kohut, and asked for constructive, rather than punitive, action. (GC Exh. 14.) Manly told Brosseau they would like him to read the letter, think about it over the weekend, and they could talk about it.

On June 4, Manly, accompanied by Kohut, Phillips, and Minninger, approached Brosseau and gave him their letter. She conveyed their concerns about his treatment of Kohut. She asked him to read the letter, think about it over the weekend, and meet with them Monday. It was the end of the work shift and they were all present.

Precise accounts of what happened next vary, but are generally consistent. Brosseau read the letter in the kitchen right after he received it. The employees perceived he immediately became angry and agitated. A discussion ensued even though the employees were off the clock. The conversation quickly became heated and Brosseau and Kohut began talking over each other. At some point, either Kohut or Minninger raised their voice and stated the employees wanted to be treated as equals.¹⁴ Brosseau, admittedly losing his cool, responded with a raised voice that they are not equals. He then explained that they are equal as human beings but not in the workplace because he owns the business and has different responsibilities and liabilities. Manly said she did not feel safe. Minninger tried to calm things down and she and Manly suggested a later meeting with a mediator. Kohut told Brosseau his ride was waiting and Brosseau said he could leave. They all agreed to set up a later meeting.

According to Brosseau, he stepped outside to regain his composure. While outside, he determined that he needed help with his relationship with Kohut and decided to try mediation. He voiced this to Kohut, who stepped outside shortly thereafter, and told him he knew someone who could help them. Brosseau would not tell Kohut who the mediator was. Kohut expressed concern that if he had his friend and business partner conduct the mediation it would not be fair. He said he wanted to bring his own mediator or find a mediator they could agree upon. Brosseau said he would think it over.

Brosseau felt his best efforts to restore his relationship with Kohut had not been working. After Kohut declined to mediate on Brosseau's terms, he and Nackoney talked at length and

¹⁴ Manly recalled it was Minninger and Brosseau recalled it was Kohut.

decided to terminate Kohut's employment. Brosseau explained that in their work environment, which was also their home, he felt the need to connect personally with his employees. He also noted that, due to the deteriorating relationship, it was difficult to address Kohut's increasing performance problems. On June 6, Brosseau told Kohut things were not working out and gave him his last paycheck during his next shift. According to Brosseau, Kohut responded that he was going to file an unfair labor practice charge, called Brosseau an asshole, and left. According to Kohut, he said he wished Brosseau could have been more adult about this and told him he would file an unfair labor practice charge. He does not believe he called Brosseau an asshole.

Manly, Minninger, and Phillips spoke with Brosseau and Nackoney after they learned Kohut had been fired. Brosseau said he was very sad about letting Kohut go, and he gave the matter a lot of consideration. When asked why Kohut was let go, Brosseau said it was mostly work performance. They told Brosseau they didn't see Kohut making an unusual amount of mistakes, and Brosseau responded that was because the mistakes mostly occurred when Kohut worked alone on Thursday. Minninger replied, "That's convenient," and Brosseau said he could understand why they feel that way.

Brosseau arranged for mediation with the remaining employees. The first session was disrupted when a picket showed up at Brosseau's house. He scheduled a second mediation and it occurred without incident. Brosseau divulged that he and Kohut had developed an antagonistic relationship and he believed Kohut hated him and didn't like his job.

Phillips quit in June 2012 because she got another job and she was frustrated with Kohut's termination. Right beforehand, she asked Brosseau if he would give Kohut his job back. He said he would not because their values were too different. Manly recalled that, in a more recent conversation about the hearing in this case, Brosseau said he would shut down company if Kohut came back.

I. Comparative Employee Performance and Discipline

Kohut's performance log indicates four entries in August and September 2011, for failing to label containers, not keeping work area clean, inconsistent dressing portioning, playing music too loud, coming to work 40 minutes early, and leaving cracker packaging bags on the table. Kohut's log is empty until late February, where it picks up and contains multiple infractions, along with some positive contributions, through to his termination. The infractions vary from failing to perform checklist items to wiping his hands on his apron. There are entries for lifting too much, recipe errors, not portioning correctly, playing talk radio when Persephone was not in school, not putting personal items in the right place, failing to turn off the dehydrator, the sunflower seed incident, and various other infractions.

Manly's performance log does not start until March 21. It contains four infractions and three positive contributions. The infractions are for failing to turn on fan but signing off on it, using the wrong size box for cracker storage, marking a dehydrator with a sign for the wrong recipe, and failing to turn up dehydrators after flipping crackers.

Phillips' performance log has one entry on March 28 stating, "Noticed that a door to a refrigerator that was off was not open and opened it."

Manly has messed up two batches of dressing that needed to be thrown out. Brosseau was not happy, but realized they were honest mistakes. She has wiped her hands on her apron and has not been told to use sanitizing towels. Manly made occasional errors but did not make chronic mistakes. Manly had to provide more instruction to Kohut than to other workers. She instructed him on the proper way to rinse celery, they had some back and forth about it, and he continued to rinse it incorrectly.

Phillips was reprimanded once for not cleaning a sink well enough and maybe for forgetting to put fan on a wet floor or opening the refrigerator when it was turned off. She occasionally stacked trays too high, portioned dressing inconsistently, and failed to keep personal items in their designated places but was not reprimanded. Employee Paul Conrad once added the wrong ingredient to a recipe and ruined it. Brosseau told him everyone makes mistakes and did not reprimand him.

Brosseau fired Susan Rusty Farrel in 2006 after serious performance problems surfaced during her first 3 weeks. He fired Tarra Mitchell, who had worked for Livin' Spoonful about 5 months, for inaccuracy with recipes and falsifying a timecard. Jack Martin, who worked for the Company less than 30 days, was fired for being rude to a customer.

Decision and Analysis

The complaint alleges that Kohut was terminated because of his protected concerted activities, in violation of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

To prove an adverse action violates Section 8(a)(1), the Acting General counsel must establish, by preponderant evidence, that: (1) the employee engaged in concerted activity, (2) the employer knew about the concerted activity, and (3) the employer had animus toward the activity. *Meyers Industries*, 268 NLRB 493, 497 (1984); *Grand Canyon University*, 360 NLRB No. 164 (2013). If the Acting General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980). See also *Signature Flight Support*, 333 NLRB 1250 (2001) (applying *Wright Line* in context of discharge for protected concerted activity).

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted

activity also includes “circumstances where individual employees seek to initiate or to induce or to prepare for group action” and where an individual employee brings “truly group complaints to the attention of management.” *Meyers II*, 281 NLRB at 887. An individual employee’s complaint is concerted if it is a “logical outgrowth of the concerns of the group.” *Every Woman’s Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992), after remand 310 NLRB 831 (1993), enf.d. 53 F.3d 261 (9th Cir. 1995).

It is undisputed that Kohut and his coworkers engaged in protected concerted activity when they presented Brosseau with the March 2 letter requesting equal pay and greater decision-making authority. The meetings that ensued were a continuation of this activity. It is also undisputed that the letter presented to Brosseau on June 4 and the ensuing discussion regarding his treatment of Kohut was protected concerted activity.

The Acting General Counsel argues that Kohut’s statement against capitalism and his comment to Brosseau that he was exploiting him are protected concerted activity. I disagree. First of all, Kohut said he told Brosseau he did not feel exploited by him personally both at the time of the initial comment and during his performance review. Moreover, taken to its logical conclusion, any employee who opposed capitalism because it creates too much income disparity between owners and workers and expressed this view to his employer would be engaging in protected concerted activity.

The Acting General Counsel cites to *Fun Striders, Inc.*, 250 NLRB 520 (1980), to argue that complaints about exploitation, when coupled with complaints about wages, are protected by the Act. In that case, however, there was a dispute over a newly implemented wage rate and had engaged in a concerted work stoppage. The leaflets at issue contained inflammatory rhetoric against capitalism and also referred to: (1) the termination of employees for rebelling against bad pay, poor treatment and refusal to work overtime; (2) low wage rates; (3) a strike in support of higher wage rates; (4) the formation of a union; and (5) various topics related to pay and benefits. The administrative law judge reasoned that the leaflets were protected because, though politically inflammatory, they *also* related to wages, hours, and working conditions. Here, by contrast, at the time Kohut made his comments about capitalism, the employees had not complained about pay or any working condition. They did not even become aware of the pay disparity among them until later. The record does not establish that other employees believed the Company was exploiting them, and Kohut testified he himself denied to Brosseau that he felt personally exploited.

The Acting General Counsel cites to *Wynn Las Vegas, LLC*, 358 NLRB No. 80, slip op. at 10 (2012), for the proposition that a single employee’s criticism of the employer’s financial treatment of its workers during a meeting is protected concerted activity. In that case, during a meeting the company president had called, an employee complained about a new tip pooling policy, stating that it diluted the tip pool and sent the message to staff that they were not very important. Here, Kohut made a general statement about capitalism he attributed to Marx. There was no complaint tied to anything Brosseau had done.

The Acting General Counsel asserts that Kohut’s criticism of Brosseau’s role as an exploitive, capitalist boss was intended to induce group activity. The evidence fails to support this, however. The programs the employees listened to on a regular basis were political and leftist. Politics was a regular topic of conversation and the parties had likewise discussed the IWW at work. Kohut’s leanings were well known to his coworkers, one of whom was a fellow union member, and to Brosseau. In fact, prior to the conversation at issue, Brosseau told Kohut he had read the IWW constitution. The preamble states, in relevant part:

There can be no peace so long as hunger and want are found among millions of the working people and the few, who make up the employing class, have all the good things of life. Between these two classes a struggle must go on until the workers of the world organise as a class, take possession of the means of production, abolish the wage system, and live in harmony with the earth.

....

It is the historic mission of the working class to do away with capitalism. (GC Exh. 15.)

Aside from this, the attempt to tie what Kohut himself repeatedly referred to as a philosophical discussion to the complaints about wages fails because the evidence shows the two are attenuated, both in time and by virtue of intervening events. Specifically, the employees’ March 2 concerted complaint about wages followed directly from their discussions about workplace concerns in January or February, which in turn were directly spurred by Brosseau’s failure to consult them before switching labels. Accordingly, I find the discussion about Marx’s theory of exploitation, and Kohut’s comments related to the topic, do not constitute protected concerted activity.

It is clear, however, that as of March 2, Kohut and his coworkers engaged in protected concerted activities about which was Brosseau aware. The Acting General Counsel must next prove animus toward the protected activity. Under Board precedent, improper motivation may be inferred from several factors, including pretextual and shifting reasons given for the employee’s discharge, the timing between an employee’s protected activities and the discharge, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

The Acting General Counsel points to the Respondent’s delay in responding to the March 2 letter requesting expanded responsibility for managing the business, equal pay, and cost-of-living and merit wage increases. Brosseau and Nackoney promptly thanked the employees for the letter and told them they were busy but would respond. They responded in writing on March 23. The response was longer than the employees’ request, which admittedly took the employees at least 2 weeks to draft. To find animus because Brosseau took the time to

consult with Nackoney and the human resources executive, and prepared a thorough letter attempting to address their complaints, stretches the bounds of reasonableness.

I likewise do not find animus based on Brosseau turning off the radio in early March. His 9-year-old daughter Persephone came into the kitchen when the program was “getting to like the good juicy part” about why the administration “thought they could kill people.” To imply animus based on this action is miles outside the bounds of reasonableness. The Acting General Counsel asserts that the short lived rule that the employees could not listen to talk radio in the kitchen is suspicious because Persephone historically came into the kitchen every now and then for short periods of time. There was no evidence, however, that she was on the verge of hearing an explanation of targeted killings. Moreover, any inference of animus based on the rule is negated by Brosseau’s willingness a few days later, at Phillips’ request, to listen to talk radio with political content while Persephone was at school.

Brosseau’s unwillingness to meet many of the employees’ demands likewise does not show animus. Though the employees were not happy with Brosseau’s response to their letter, there is nothing to show he was doing anything other than trying to address their complaints. He was not required to agree with them or grant their requests. On two occasions, he took the time to meet with them to discuss their concerns. Though Brosseau’s demeanor was perceived as more combative and defensive in the second meeting, this does not prove animus. At this point in time, faced with demands from employees he could not and/or did not want to grant, nothing about his actions in the meeting strikes me as abnormal. His subsequent actions of granting a cost-of-living increase, implementing a performance review system, and telling employees he would consider merit raises the following August if economically feasible, show that he was attempting to address at least some of their concerns. Even though these attempts failed from the employees’ perspective, there is nothing to show they had a disingenuous motive.

Brosseau admittedly became agitated during the meeting after he was presented with the June 4 letter. He immediately followed his outburst that he and the employees were not equal by saying they were equal as people and offering to have a mediator work with him and Kohut. Again, Kohut may not have been willing to agree to Brosseau’s terms for the mediation, but there is nothing to show his offer was borne out of an unlawful motivation.

The Acting General Counsel points to disparate treatment, stating that other employees made mistakes similar to Kohut, but were not disciplined. All three employees, however, engaged in the protected concerted activity at issue. They all drafted and signed the March 2 letter. Kohut spoke more during the subsequent meetings than Manly or Phillips. However, it was Phillips who approached Brosseau in March and requested to listen to the radio while Persephone was at school. Later, Manly told Brosseau they were concerned about his treatment of Kohut and the purported change to how discipline was being administered. She handed him the June 4 letter and asked him

to read it over the weekend. They engaged in the same protected activities as Kohut, with each of them leading different aspects of it.

Finally, many of the Respondent’s actions are inconsistent with a finding of animus toward the protected concerted activity. For example, as detailed above, on more than one occasion Brosseau permitted employees time off from work to attend events supporting organized labor. In addition, Brosseau and Nackoney decided to implement a policy providing a week of paid paternity leave in response to Kohut’s announcement that, for economic reasons, he only planned to take a day off after the birth of his child. Kohut took the leave and returned to work. After the heated discussion surrounding the employees’ June 4 letter, Brosseau immediately offered to have a mediator work with himself and Kohut to restore a positive relationship. At Manly’s request, he hired a mediator to work with the remaining employees despite their participation in protected concerted activities, including a protest rally at his house.¹⁵ I find he was very tolerant of the protected activity, and honestly worked to find solutions with the employees while retaining his right to run his business as he saw fit.

Based on the foregoing, I find that the Acting General Counsel has failed to meet its burden to prove that animus toward Kohut’s protected concerted activities motivated the Respondent’s decision to discharge him.

Assuming the Acting General Counsel has met its initial burden, I find the Respondent has proven Kohut would have been terminated even had he not engaged in protected concerted activities. Brosseau stated he terminated Kohut based on a combination of performance problems and communication barriers stemming from the breakdown of their personal relationship.

Turning to performance, the Acting General Counsel argues that Brosseau’s performance logs were a sham, or at the very least inaccurate. It is clear they are not perfectly accurate. I credit Manly’s testimony that she has messed up two batches of dressing that needed to be thrown out, yet this is not reflected on her performance log. I likewise credit Phillips’ testimony that she was reprimanded for not cleaning a sink well enough, though this is not reflected on her performance log.

Manly also stated she wiped her hands on her apron, and Phillips said she occasionally stacked trays too high, portioned dressing inconsistently, and failed to keep personal items in their designated places but was not reprimanded. There is no evidence establishing Brosseau knew about all of these infractions, however. Moreover, Kohut likewise was not contemporaneously reprimanded for many infractions, consistent with Brosseau’s testimony that he did not point out each mistake with each employee on every occasion.

¹⁵ The Acting General Counsel asserts the mediation only occurred because employees threatened to quit. According to Brosseau, Manly said she did not feel safe continuing the June 4 conversation without a mediator. Tr. 164. Phillips likewise said she did not feel safe and they needed a mediator to allow them space to speak. They continued to work, however. Tr. 323. I note that Phillips voluntarily after the second mediation, which was after the rally.

The Acting General Counsel further notes that Kohut's improper arrival to work early was noted on September 14, 2011, yet his early arrivals October 14 and November 22 were not on the log. I note no entries were made at all in October and November. While these omissions show the log was not an accurate reflection of every employee's mistakes, the fact that infractions for arriving to work early were noted before any alleged protected activity weighs strongly against a finding that they were fabricated to conceal unlawful animus.

Significantly, Brosseau, acknowledged he did not always record every infraction. There was clearly a time when he was not recording anything, i.e., from September 22, 2011, to February 27, 2012.¹⁶ If the performance log was the sole justification for Kohut's termination, its imperfections would be more problematic. As discussed more fully below, however, it is not.

The Acting General counsel also asserts that the logs are suspect because entries are phrased in the past tense. Specifically, the entry for March 5 refers listening to politically-oriented talk radio while Persephone was in the room, which was against policy "at that time." Brosseau explained it would have been clearer for him to say "at the time." Even if the entry was not made contemporaneously, however, this does not show it was a fabrication. Clearly, the event occurred and it was Kohut who confronted Brosseau about turning off the radio. Brosseau testified that if he was near his computer he would record a mistake but if not he would do it later.

Finally, the Acting General Counsel notes that the entry on Kohut's log on March 8 for assuming responsibility for planning the day's work without consulting Brosseau reveals Brosseau's true concerns about Kohut. The entry further reads, "No kitchen staff has ever been assigned to take this responsibility . . . there was no precedent regarding the task other than Jim handled it." (GC Exh. 12.) Even if this was a concern, the fact that Brosseau did not want Kohut assuming his own responsibilities without telling him does not point to unlawful motivation.

The Acting General Counsel asserts that the performance reviews are evidence of pretext. Although the first review was generally positive, the Acting General Counsel argues Kohut was unfairly criticized for the commonplace mistakes of wiping his hands on his apron and leaving a box of crackers hanging over the edge of the table. These were two of the examples noted under the heading "is receptive to receiving directions from management and implements changes and new tasks without needing to be reminded." Kohut claimed these errors occurred before he received his raises. In any event, it is clear Brosseau's point was the bigger picture, not any particular error or errors. Notably, under this same heading, Phillips wrote, "Not always initially pleased to receive criticism, but willing to make changes. Sometimes needing reminders." In addition, Manly said she had to provide more instruction to Kohut than to other workers. Brosseau's perceptions were not so out of line as to create an inference that they stemmed from animus.

Turning to the second review, the Acting General Counsel faults Brosseau for bringing up new problems while stating Kohut has continuing ongoing performance problems. Again, this misses the forest for the trees. The point is there were still problems.

As a final performance issue, Kohut was faulted for not putting enough water on the sunflower seeds on May 25, and was told that further mistakes of this nature would result in the loss of his Thursday shift. This was Kohut's first shift after his return from paternity leave and his first time working with the new seeds. Manly's first time working with the new seeds had been the prior Tuesday. Though she did not have seeds coming into contact with air, she said it was close and she realized she would need to add more water. Brosseau made the same mistake when he soaked the seeds the following Sunday, and on May 28 he told the employees to add more water. Kohut's testimony that he did not know there were new seeds is uncontroverted and I credit it. While Brosseau stated one of the problems was that Kohut failed to level the seeds, resulting in the peak in the corner above the water line, he also noted that Kohut failed to add enough water. (Tr. 146; GC Exh. 13.) If this the seed incident was the sole reason for Kohut's termination, it would not be fair, though based on the facts before me I would not find it was the result of unlawful animus. Kohut was not terminated after this incident, however.

The Acting General Counsel emphasizes Kohut's higher pay rate to argue performance concerns are pretext. The raise that elevated Kohut over his coworkers came in August 2011, before any of the events at issue. Brosseau's failure to dock his pay is not telling absent evidence that he used pay cuts as a way of addressing declining performance.

The incidents on June 4 are another basis for the Acting General Counsel's pretext argument. As detailed in the statement of facts, it is clear Brosseau lost his composure when confronted with the letter regarding Kohut's discipline. The Acting General Counsel asserts that Brosseau's outburst stating it was his company and the employees were not his equals "speaks volumes as to his true motivation in discharging the employees' de facto leader." (GC Br. 37.) I do not agree. The comment was made in the course of a heated discussion. Immediately afterward, in response to Minninger, Manly, and Phillips saying they did not feel safe, Brosseau agreed to meet with the employees and, at his expense, hire a mediator to help resolve things.

Brosseau also wanted a mediator to work with him and Kohut on their relationship. I find this was a genuine offer, as evidenced by the fact that Brosseau already had decided on a mediator and he had told the employees he had planned mediation for just himself and Kohut.¹⁷ Moreover, his testimony about his relationship with Kohut and his desire to help fix it through mediation appeared genuine and credible. After Kohut balked at mediating on Brosseau's terms, Brosseau determined that his efforts were over.

¹⁶ Had Brosseau gone back and fabricated the log, it would not make sense for the log to include this glaring lapse of time without any entries.

¹⁷ Though Kohut described the mediator he thought Brosseau had chosen as a close personal friend, he based this only on knowledge that Brosseau had been to his property and they had discussed a potential business opportunity.

Kohut's refusal to mediate on Brosseau's terms leads into his other stated reason for terminating Kohut, i.e., their relationship had broken down and he felt that, despite his best efforts, he could not establish a rapport with Kohut on his own. Brosseau emphasized this was not only important for addressing work performance issues, but was also important for establishing a harmonious environment for his home based small company. The parties agree the source of the interpersonal strain between Kohut and Brosseau was Kohut's comments in late 2011 or early 2012 about Marx's theory on exploitation and Brosseau's belief that Kohut thought he was exploiting him. Brosseau offered a way to try to improve things. Kohut rejected this offer unless it could be on his terms. For that to be Brosseau

and Nackoney's last straw does not, in my view, indicate unlawful motivation. Instead, it strikes me as eminently reasonable.

Based on the foregoing, I find the Acting General Counsel failed to establish that the Respondent violated Section 8(a)(1) of the Act as alleged.

CONCLUSION OF LAW

The Respondent's action of terminating Adam Kohut did not violate Section 8(a)(1) of the Act.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 26, 2013